Supreme Court, U.S.
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(2)

No. 98-1641

IN THE

Supreme Court of the United States

TRACY ASHCRAFT and CAROLYN ASHCRAFT,

Petitioners,

v.

HWA-SHAIN YEH, M.D. and
MAYFIELD NEUROLOGICAL INSTITUTE, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

Respondent, Mayfield Neurological Institute, Inc., has no parent companies and there are no publicly held companies that own 10% or more of its stock.

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STATEMENT OF THE CASE

This Petition seeks this Court's review of six Orders from the United States District Court of the Southern District of Ohio, Western Division, in a medical negligence case that was brought under 28 U.S.C. § 1332 due to diversity of the parties.

This medical negligence action was filed on March 20, 1992 by the Petitioners against the Respondents as well as other medical providers. [R.1 Complaint dated March 20, 1992, JA 000022]. This was a refilling of an action that was previously dismissed other than on the merits. [Tr. 1/10/97, pp. 169, JA 000308]. The Petitioners' claims arise from epilepsy brain surgery that was performed on Tracy Ashcraft by Respondent Dr. Yeh in 1989. That surgery involved the removal of a portion of Petitioner Tracy Ashcraft's right frontal lobe rather than a removal of the entire right frontal lobe as misstated in the Petitioner's Statement of Facts. At the time of his surgery, Tracy Ashcraft was twenty years old.

The case proceeded to a Summary Jury Trial on December 18, 1995, which resulted in a verdict in favor of Respondents. Petitioners made their *first* settlement demand at a Settlement Conference in January, 1996. In view of the results of the Summary Jury Trial and in consideration of their evaluation of the case including the expert witnesses, Respondents determined that they had no liability in the case and no settlement offer was made.

The case proceeded to Trial beginning on May 16, 1996 and the jury returned with a verdict in favor of the Petitioner Tracy Ashcraft in the amount of Four Million Two Hundred Fifty Thousand Dollars ($4,250,000.00) on June 10, 1996. The District Court directed a verdict in favor of Respondents on the loss of consortium claim of Petitioner Carolyn Ashcraft following opening statement of the parties. Judgment was entered on June 10, 1996 [R. 105, Judgment, 1/10/96, JA 000027].

Thereafter, Petitioners filed a Motion for Prejudgment Interest [R. 106, 1/10/96, JA 000029]. Respondents filed their Memorandum in Opposition to the Motion for Prejudgment Interest and oral argument was requested [R. 109, Memorandum, 6/20/96, JA 000031]. A Hearing took place on October 11, 1996 to review discovery issues between the parties relating to the Prejudgment Interest Motion [R. 152, Civil Minutes, 10/11/96, JA 000088].

Respondents moved for a protective order on Petitioners' discovery on approximately twelve (12) documents in its insurer's claims file which it claimed was privileged [R. 152, p. 22-23]. The court held an *in camera* inspection at the October 11, 1996 Hearing and ordered that the documents were privileged and properly withheld.

Petitioners did nothing to preserve the record of these privileged documents for appeal until January 23, 1998 when, long after the October 11, 1996 Hearing, Petitioners moved the court to complete the record by including the documents from the *in camera* inspection [R. 179; 1/23/98]. The court denied the Motion on February 2, 1998 for the reason that the court understood that the Sixth Circuit Clerk would make a request to the District Court Clerk if it intended to review the documents and the District Court Clerk would then forward them to the Sixth Circuit and no such request was made in this instance [R. 184, 3/2/98]. Further, the Clerk never retained the documents as an exhibit (because Petitioner never requested that they be marked as an exhibit), they were returned to the Respondents [R. 184, 3/2/98]. Petitioners' failure to request that the documents be marked as an exhibit is a waiver.

A day long Evidentiary Hearing on the Motion for Prejudgment Interest took place on January 10, 1997 at which time witnesses for the Petitioners and the Respondents were called [R. 155, Civil Minutes, 1/10/97, JA 000144]. An additional hearing on the Motion for Prejudgment Interest took place on March 28, 1997 [R. 178, Civil Minutes, 3/28/97, JA 000369]. The District Court filed its Order denying the

Motion for Prejudgment Interest on March 31, 1997 [R. 157, Order, 3/31/97, JA 000055]. Petitioners filed their Notice of Appeal on April 21, 1997 [R. 158, Notice of Appeal, 4/21/97, JA 000058].

On December 17, 1997, Respondents paid Four Million Six Hundred Twenty Four Thousand Seven Hundred Ninety Seven Dollars Thirty Two Cents ($4,624,797.32) into the District Court, representing the verdict plus the entire amount of postjudgment interest that had accrued to that date and moved the District Court to order a Satisfaction of Judgment [R. 173]. Petitioners opposed the Satisfaction of Judgment and argued that a Satisfaction of Judgment would prejudice their pending appeal [R. 175]. Petitioners did not object to the amount that Respondents had paid for postjudgment interest of the manner in which it was calculated [R. 175]. After oral argument, the District Court granted Respondents' Motion for Satisfaction of Judgment, but limited it to only the verdict and postjudgment interest that had accrued until December 17, 1997 [R. 177]. The District Court specifically ordered that the Satisfaction of Judgment did not concern the Petitioners' claims which were pending in the Sixth Circuit Court of Appeals (Petitioner Carolyn Ashcraft's loss of consortium claim and Petitioner Tracy Ashcraft's appeal from the Trial Court's denial of prejudgment interest) [R. 177].

The Clerk had deposited the Four Million Six Hundred Twenty Four Thousand Seven Hundred Ninety Seven Dollars Thirty Two Cents ($4,624,797.32) paid by Respondents on December 17, 1997 into an interest bearing account. On January 16, 1998, the Clerk was ordered to pay to Petitioner the Judgment plus all interest that had accrued to that date [1/16/98 Registry Entry, R. 190]. Even though the Clerk deducted One Thousand Eighty One Dollars Sixty Cents ($1,081.60) for registry fee, Petitioner was ultimately paid Four Million Six Hundred Thirty Five Thousand Six Hundred Sixty Three Dollars Thirty One Cents ($4,635,663.31), nearly Eleven Thousand

Dollars ($11,000.00) more than Respondents and paid to the Clerk to satisfy the Judgment [1/16/98, Registry Entry, R. 190].

Postjudgment interest was calculated according to 28 U.S.C. § 1961 which provides the rate of interest on Judgments in a civil case heard in a U.S. District Court.

The Petitioner first objected to the calculation of postjudgment interest when he filed his Notice of Appeal. No argument or objection regarding the calculation of postjudgment interest was made to the District Court.

Respondents paid the money into the court for the simple reason that Petitioners refused to provide the Respondents with a Satisfaction of Judgment if they, in fact, paid the amount of the Judgment to the Petitioners. To avoid ever escalating postjudgment interest and to obtain a Satisfaction of Judgment that they would rightfully be entitled to if they paid the Judgment, Respondents paid the Judgment into the court.

After the Petitioners' action was refiled in 1992, the Respondents filed an Answer and served significant discovery requests including Interrogatories and Request for Documents on the Petitioners. [Tr. 1/10/97, pp. 169, JA 000308]. The Petitioners' responses to the Respondents' discovery requests were very important from the standpoint of evaluating Tracy Ashcraft's condition prior to surgery and his condition following surgery. The Respondents found it particularly important to investigate this matter with regard to any proximate causal relationship between the surgery and the claimed injuries [Tr. 1/10/97, pp. 170, JA 000309]. The only way for the Respondents to obtain all of the medical records in the case was to obtain the records through the Petitioners [Tr. 1/10/97, pp. 170-171, JA 000309-000310] [Combs depo., pp. 17-18, JA 000591]. The Petitioners apparently had some difficulty in obtaining records from the University of Cincinnati Medical Center, not from the Respondents [Tr. 3/28/97, pp. 28, JA 000396].

Unfortunately, the Respondents did not receive answers to their discovery requests until approximately two years later in

1994. The Petitioners' delay in providing discovery responses interfered with the Respondents' ability to evaluate the case and the Respondents could not make a determination as to whether or not there was a proximate causal connection or endeavor to obtain expert witnesses without all of the medical records in the case which could not be obtained without the cooperation of the Petitioners [Tr. 1/10/97, pp. 172, JA 000311].

In fact, prior to Trial, Respondents sent an assistant to Petitioners' counsel's office to help put together Petitioners' medical records which were a mess [Tr. 1/10/97, pp. 105, JA 000246-000247]. A joint exhibit of medical records was put together and there were a few pages that were mistakenly included that included some highlightings [Tr. 1/10/97, pp. 109-110, JA 000251-000252]. These were replaced before they went to the jury.

With regard to the missing lateral x-ray, the fact that an x-ray was missing in the University of Cincinnati Medical Center records is not surprising — it happens all the time [Tew depo., pp. 50, JA 000753].

The Petitioners did not identify their expert witnesses until 1994, more than two years after the case was refiled [Tr. 1/10/97, pp. 173, JA 000312]. When Petitioners' experts were identified, their depositions were not timely provided by the Petitioners despite Respondents' requests for those depositions [Tr. 1/10/97, pp. 173-174, JA 000312-000313]. The deposition of the Petitioners' expert neurologist, Dr. Krauss, and the Petitioners' expert neurosurgeon, Dr. Penney, were not obtained until a few weeks before Trial, in April, 1996 — four years after the action was refiled [Tr. 1/10/97, pp. 174, JA 000313]. Dr. Krauss acknowledged that Respondent Dr. Yeh, was entitled to rely on the interpretations made by the treating neurologist, Dr. Privitera [Combs depo., pp. 24, JA 000592]. A neurologist deals with issues from a medical standpoint whereas the neurosurgeon deals with the issues from a surgical standpoint [Tr. 1/10/97, pp. 174-175, JA 000313]. The Petitioners' neurosurgeon witness, Dr. Penney, agreed in his deposition that

the Respondent Dr. Yeh was entitled to rely on the consultation of the treating neurologist, Dr. Privitera [Tr. 1/10/97, pp. 175, JA 000314]. While initially a Respondent in this action, Dr. Privitera was dismissed as he was an employee of the University of Cincinnati and, therefore, any claims against him must be brought against the State of Ohio in the Ohio Court of Claims.

Despite the difficulties in obtaining medical records and discovering the identities of the Petitioners' experts, the Respondents endeavored to obtain their own experts in the case. These experts did not come from a pool of friends of the Respondents [Tr. 1/10/97, pp. 176, JA 000315]. It is true that Mayfield Neurological Institute, Inc., Dr. Yeh's group, is an internationally recognized group of neurologists and neurosurgeons with whom most expert witnesses in the field of neurology or neurosurgery would be familiar. [Tr. 1/10/97, pp. 176-177, JA 000315-000316]. The Respondents looked at a number of expert witnesses which included Dr. Rayport. Dr. Rayport was not used, but he was not critical of the Respondents, contrary to Petitioners' misstatements. Respondents' counsel consulted with Dr. Rayport and he had no criticisms of the Respondents, but Dr. Rayport used a different means and mechanism in providing the same treatment and it was determined that the Respondents would rather utilize somebody that used the same approach [Tr. 1/10/97, pp. 178, JA 000317]. Contrary to Petitioners' misstatements in their Petition, Dr. Rayport did not have the opinion in this case that Respondents were negligent [Tr. 1/10/97, pp. 179, JA 000318].

The Respondents also considered Dr. Anderman who was also not critical of the Respondents and, in fact, was very supportive [Tr. 1/10/97, pp. 179, JA 000318]. However, Dr. Anderman was a citizen of Canada and the Petitioners indicated that they would object to his testimony in the case since he was not licensed in the United States [Tr. 1/10/97, pp. 179, JA 000318]. Thus, the Respondents elected not to use Dr. Anderman for fear that his testimony would be prohibited.

The Respondents also considered Dr. Wyler. Initially, Dr. Wyler was "on the fence" as far as his opinion based on the initial records he was provided [Tr. 1/10/97, pp. 180, JA 000319]. The Respondents were having difficulties obtaining records in the case and, thus, experts could not be given all the records initially. After Dr. Wyler received the additional records, he had a very favorable opinion for the Respondents and intended to testify [Tr. 1/10/97, pp. 180, JA 000319]. Petitioners objected to the Respondents' use of Dr. Wyler since the Petitioners had previously contacted him regarding this case [Tr. 1/10/97, pp. 180, JA 000319] [Combs depo., pp. 11-13, JA 000589-000590]. In fact, it was discovered that the Petitioners' counsel had contacted at least twenty nine potential expert witnesses across the country although they certainly did not use those witnesses at Trial [Combs depo., pp. 12, JA 000589]. A Hearing was held before Magistrate Steinberg on the issue of use of Dr. Wyler as the Respondents did not want to give up Dr. Wyler as an expert. Unfortunately, the Respondents were not permitted to use Dr. Wyler [Tr. 1/10/97, pp. 180-181, JA 000319-000320]. Interestingly, the Petitioners did not call Dr. Wyler at Trial even though their Petition suggests that his opinions would have been favorable to Petitioners [Tr. 1/1097, pp. 181, JA 000320].

The Respondents also consulted Dr. Gates, but the effort to have Dr. Gates review the case was short circuited when Respondents' counsel learned that Dr. Gates made an effort to become involved in an employment relationship with the Respondents previously and it was felt that it would be inappropriate to use him as an expert in this case for that reason [Tr. 1/10/97, pp. 181, JA 000320].

The Respondents eventually used Dr. Ojemann as their expert. Dr. Ojemann is very well known within the field of neurosurgery and epilepsy surgery and is nationally recognized for his expertise in this particular area [Tr. 1/10/97, pp. 182, JA 000321]. In fact, Dr. Ojemann's reputation is international [Tr. 1/10/97, pp. 125, JA 000267]. Dr. Ojemann was felt by Respondents to be straight forward and not a physician who

spends a lot of time testifying in lawsuits [Tr. 1/10/97, pp. 182, JA 000321]. Dr. Ojemann was produced for discovery late in the case for the sole reason that the Respondents had not been able to obtain Dr. Penney's deposition and the Respondents determined that the Petitioners' experts should be produced first since they had been requested first [Tr. 1/10/97, pp. 188-189, JA 000327-000328].

Respondents provided Dr. Ojemann with the entire record in the case and he determined what portions of the record were important and significant and necessary for his opinions in the case [Tr. 1/10/97, pp. 108, JA 000249-000250].

Dr. Ojemann's connections to Mayfield were as a colleague and due to the fact that virtually every expert in the field of epilepsy surgery is familiar with Respondents [Tr. 1/10/97, pp. 182-183, JA 000321-000322].

The delays in this case were the result of the initial dismissal of the Petitioners' claims, the fact that the Respondents had to file a Motion for Summary Judgment just to obtain the identities of the Petitioners' expert witnesses, the delays in identification of the Petitioners' expert witnesses and identification of other witnesses [Combs depo., pp. 26, JA 000593]. Respondents did not delay the case.

The evaluation of Dr. Penney as a neurosurgeon and expert witness was important to the case. He was considered a fair witness, but did not have nearly the qualifications of Dr. Yeh or Dr. Ojemann [Tr. 1/10/97, pp. 187, JA 000326]. Dr. Penney did not have much experience in epilepsy surgery and had only performed a handful of the procedures — by his own admission, epilepsy surgery was not his focus: his own brochure indicated that he specialized in spine surgery [Tr. 1/10/97, pp. 187, JA 000326] [Yeh depo., pp. 23 and 40, JA 000790, 000807]. Additionally, Dr. Penney was not even board certified in neurosurgery [Tr. 1/10/97, pp. 126, JA 000268]. Importantly, Dr. Penney conceded that Dr. Yeh was entitled to rely on the consultation by the treating neurologist, Dr. Privitera [Tr. 1/10/97, pp. 188, JA 000327].

Of particular importance at Trial was the testimony of Tracy Ashcraft's current treating neurologist, Dr. Heath. Dr. Heath was not an expert witness retained by the Respondents. Rather, he was the treating neurologist obtained by the Petitioners to treat Tracy Ashcraft from 1990 through the time of the Trial [Trial Tr., pp. 937-940, JA 000654-000657]. Dr. Heath has been treating patients with neurological difficulties for twenty three years including epilepsy patients. He was treating Tracy Ashcraft for his epilepsy and was the treating neurologist for Tracy Ashcraft for his epilepsy following the surgery and up to the time of Trial [Trial Tr., pp. 949-950, JA 000666-000667]. Dr. Heath testified that patients with seizures tend to have a worsening of the seizures over time [Trial Tr., pp. 950, JA 000667]. Dr. Heath testified that he had been following Tracy for the previous five to six years and that he had observed a gradual change in Tracy over the years [Trial Tr., pp. 952, JA 000669]. Dr. Heath specifically indicated that the cause of the change in Tracy Ashcraft following surgery was due to the use of different medications and that the natural progressions of a patient suffering seizures is to have a deterioration of their personality [Trial Tr., pp. 952-953, JA 000669-000670]. Dr. Heath testified that the problems that Tracy Ashcraft was having were the result of the natural progression of his epilepsy and not the surgery [Trial Tr., pp. 960, JA 000677].

The Respondents also called Dr. Bornstein, a neuropsychologist and Professor of Psychiatry, Neurology and Psychology and Director of the Neuropsychology Laboratory at the Ohio State University [Trial Tr., pp. 990-991, JA 000449-000450]. Dr. Bornstein had evaluated approximately five hundred epilepsy patients in his career [Trial Tr., pp. 991, JA 000450]. Dr. Bornstein examined Tracy Ashcraft in December, 1995 and reviewed previous psychological and neuropsychological examinations dating back to the time before Tracy's surgery in 1989 [Trial Tr., pp. 994-995, JA 000453-000454]. Dr. Bornstein testified that review of all the neuropsychological tests that have been performed on Tracy

Ashcraft demonstrated that, after his surgery, his performance and testing had returned to his base line level functioning before the surgery by September, 1991 so that any decline after that time was not related to the surgery [Trial Tr., pp. 1020-1021, JA 000479-000480]. The most likely cause of additional decline was the continued course of his seizure disorder [Trial Tr., pp. 1021, JA 000480].

The Respondents also called Dr. Hartings who had been hired by Petitioners to perform neuropsychological testing and Dr. Hartings testified that Tracy Ashcraft had returned to "base line" where he was before the surgery [Tr. 1/10/97, pp. 196, JA 000335].

Of significant importance in the evaluation of the case was the Summary Jury Trial in December, 1995. As District Court Judge Spiegel testified in the January 10, 1997 Prejudgment Interest Hearing, the purpose of the Summary Jury Trial was to predict the outcome of the Trial [Tr. 1/10/97, pp. 70, JA 000213] [Yeh depo., pp. 58-59, JA 000825-000826].

The Summary Jury Trial resulted in a verdict in favor of Respondents on the issue of liability [Tr. 1/10/97, pp. 85, JA 000228].

A month after the Summary Jury Trial, the Petitioners made their *first* settlement demand in the case at a Settlement Conference in January, 1996, only a few months before Trial and almost five years after the case was originally filed in 1991 [Tr. 1/10/97, pp. 192, JA 000331]. At the time of the Settlement Conference, Judge Spiegel was concerned with the Petitioners' informed consent claim and potential liability for Respondents on that claim [Tr. 1/10/97, pp. 193, JA 000332]. In fact, at Trial, the jury resolved the Petitioners' claim for lack of informed consent in favor of the Respondent [Tr. 1/10/97, pp. 193, JA 000332]. At the time of the Settlement Conference in January, 1996, the Petitioners' counsel advised Respondents' counsel that the Two Million Dollar ($2,000,000.00) demand was a "bottom dollar" demand — Petitioners never asked for a counter

offer or indicated that some other figure could be negotiated [Tr. 1/10/97, pp. 193-194, JA 000332-000333].

In fact, the Respondents had talked about an offer of Seventy Five Thousand Dollars ($75,000.00) to One Hundred Thousand Dollars ($100,000.00), but the Petitioners Two Million Dollar ($2,000,000.00) "bottom dollar" demand resulted in no offer of the Seventy Five Thousand Dollar ($75,000.00) to One Hundred Thousand Dollar ($100,000.00) range being made since it would be pointless [Tr. 1/10/97, pp. 129, JA 000271].

Respondents' insurance company, Physician's Insurance Company of Ohio, also sent the case to "claims committee" where the case was reviewed by an attorney and a physician who also recommended that the case should be defended [Cole depo., pp. 21-22, JA 000549-000550]. The Mayfield Neurological Group evaluated the claim including a Board of Directors meeting in which Dr. Yeh made a presentation, followed by a discussion and consideration of the legal process [Tew depo., pp. 12-13, JA 000715-000716]. Respondents never had a policy to not settle cases [Tew depo., pp. 42, JA 000745], and, in fact, since 1970, the Respondents have settled more than fifty percent of the lawsuits filed against them [Tew depo., pp. 42, JA 000745] [Gilligan depo., pp. 16-17, JA 000611-000612]. Dr. Tew was the Chairman of Mayfield and the Chairman of the Neurosurgery Department at the University of Cincinnati and has extensive training in neurosurgery and epilepsy including two years of training at the National Institute of Health and six years of residency in that area [Tew depo., pp. 13-14, JA 000716-000717]. Dr. Tew performs surgery for epilepsy and has been operating on epileptic patients since 1969 [Tew depo., pp. 13-15, JA 000716-000718]. Dr. Tew was involved in the claims evaluation by Mayfield and spoke with Dr. Yeh regarding the case and, together with the Mayfield Board, reached a consensus that the case should be defended [Tew depo., pp. 16-19, 28, 36, JA 000719-000722, 000731, 000739].

In considering the liability situation, the Respondents considered the review of the case by their own expert witnesses,

the results of the Summary Jury Trial, the result of a multi-disciplinary conference that indicated that Tracy Ashcraft should have the surgery in question and the fact that the Respondents had the case reviewed by one of the leading experts in the world, Dr. Ojemann, who opined that they had no liability in the case [Tr. 1/10/97, pp. 125-126, JA 000267-000268].

The Respondents filed two Motions for Continuance in the case. One was a request for continuance of the Trial or for exclusion of the Petitioners' experts since the Respondents had not been able to obtain discovery of the Petitioners' experts' opinions [Tr. 1/10/97, pp. 194, JA 000333]. The other Motion for Continuance was due to the fact that Respondents' counsel was in the middle of another Trial and a *two day* continuance of the Trial was obtained so that she could finish the Trial in which she was already involved [Tr. 1/10/97, pp. 194, JA 000333].

Respondents continuously attempted to resolve discovery disputes extra judicially and gave Petitioners significant leeway as the Petitioners consistently indicated that they needed more time in the case [Tr. 1/10/97, pp. 199, JA 000338].

In Judge Spiegel's testimony, he indicated that it was demonstrated that Petitioners difficulties with the discovery were due to Dr. Privitera of the University of Cincinnati and not with Respondents [Tr. 1/10/97, pp. 82-84, JA 000225-000227].

With regard to the Petitioners' request for a tape of a presentation made by Dr. Yeh, the tape was kept by the University of Cincinnati library and Dr. Yeh had never even seen the tape [Yeh depo., pp. 35-36, JA 000802-000803].

Part of the evidence considered by the District Court upon the Motion for Prejudgment Interest was the claims file of Physicians of Insurance Company of Ohio, the Respondents' insurance company. Similarly, the Respondents requested and then moved to compel production of the Petitioners' file to investigate whether or not the Petitioners cooperated with the discovery, delayed the case or made a good faith effort to settle the case. Respondents' Motion to Obtain the Petitioners' files

was denied [Tr. 3/28/97, pp. 2, JA 000370]. On the other hand, the claims file was admitted as an exhibit [Tr. 3/28/97, pp. 4, JA 000372].

Even though the claims file had been filed as an exhibit in the case, the Petitioner attempted to introduce a so called "summary" of the claims file which was actually not a proper summary under Rule 1006 of the Federal Rules of Evidence. The record reflects that Petitioners made only a partial list of things that were in the claims file and characterized the evidence with a clear slanting of the presentation of the evidence [Tr. 3/28/97, pp. 9-10, JA 000377-000378]. The court determined that it would look at Rule 1006 and consider the summary [Tr. 3/28/97, pp. 10, JA 000378]. After reviewing Rule 1006 and the proposed summary, the court determined that it was not a summary and, rather, was only an excerpt of a few items that were in the claims file and that it would not be helpful to the court [Tr. 3/28/97, pp. 43-44, JA 000411-000412]. In fact, review of the 1/10/97 Hearing shows that the Petitioners were given every opportunity to present their case and to present argument including the court's statement at the end of the 3/28/97 Hearing that the court had already heard everything and had lived with the case for a long time, but still Petitioners' counsel was still permitted to argue further [Tr. 3/28/97, pp. 32-33, JA 000400-000401].

Petitioner Carolyn Ashcraft brought a claim against the Respondents for loss of consortium for the harm done to her adult son. At the time of his surgery, Tracy Ashcraft was 20 years old. Petitioner Carolyn Ashcraft's claim was dismissed upon a motion for directed verdict following the opening statements of the parties. Petitioners failed to make a statement in opening statements that Tracy Ashcraft had been reduced to the mental capacity of a child.

REASONS FOR DENYING THE WRIT

I. THE FACTS OF THE CASE AND COURSE OF THE PROCEEDINGS DID NOT SUPPORT THE IMPOSITION OF PREJUDGMENT INTEREST.

II. THE UNITED STATES DISTRICT COURT PROVIDED A MEANINGFUL HEARING ON THE PETITIONER'S MOTION FOR PREJUDGMENT INTEREST

In the District Court's well reasoned decision overruling Petitioners' Motion for Prejudgment Interest, the court found that Respondents did not make a settlement offer; that Respondents were not required to make a settlement offer as Respondents had a good faith, objectively reasonable belief they were not liable to Ashcraft; that Respondents fully participated and cooperated in discovery; and that Respondents did not attempt to unnecessarily delay the resolution of the matter [R. 157, Order, 3/31/97, JA 000055].

Petitioners do not dispute that the District Court properly utilized the applicable law in overruling his Motion for Prejudgment Interest. Rather, Petitioners argue that the District Court abused its discretion when weighing the evidence as presented from both parties' Briefs and two evidentiary hearings where the testimony of numerous individuals was heard. Ample evidence can be found in the record to support the District Court's findings and ruling, including the District Court's *two* hearings on the subject. Thus, Petitioners can not demonstrate that the District Court abused its discretion in overruling Petitioners' Motion for Prejudgment Interest.

Petitioners' Motion for Prejudgment Interest sought to recover Prejudgment Interest under Ohio Revised Code § 1343.03(C) which states:

> Interest on a judgment, decree, or order for the payment of money rendered in a civil action based on tortious conduct and not settled by agreement of the parties, shall be computed from the date the cause

> of action accrued to the date on which the money is paid, if, upon motion of any party to the action, the Court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case.

Thus, Petitioners bore the burden of demonstrating that Respondents failed to make a good faith effort to settle the case and that Petitioners did not fail to make a good faith effort to settle the case. The definition of a good faith effort to settle is absent from O.R.C. § 1343.03(C), but has been developed by the case law.

In *Kalain v. Smith*, 25 Ohio St. 3d 157, 495 N.E.2d 572 (1986), the Supreme Court of Ohio set forth the criteria necessary for a showing of when a party has not failed to make a good faith effort to settle under R.C. 1343.03(C) by stating:

> If he has (1) fully cooperated in discovery proceedings, (2) rationally evaluated his risks and potential liability, (3) not attempted to unnecessarily delay any of the proceedings, and (4) made a good faith monetary settlement offer or responded in good faith to an offer from the other party.
>
> If a party has a good faith, objectively reasonable belief that he has no liability, he need not make a monetary settlement offer.

Id.

Thus, a party need not make a monetary settlement offer if that party has a good faith objectively reasonable belief that he has no liability. *Kalain*, *supra* at 157. Respondents did not make a settlement offer: Respondents had a good faith, objectively reasonable belief that they had no liability.

The record demonstrates ample evidence in support of the District Court's finding that Respondents had a good faith

objectively reasonable belief that they had no liability, including but not limited to:

1. Dr. Yeh is an eminently qualified neurosurgeon, well respected in his field;
2. The decision to go forward with the surgery was not made solely by Dr. Yeh, but was the product of an epilepsy conference at the University of Cincinnati Medical Center which determined that the surgery was appropriate;
3. Dr. Yeh reasonably relied on the opinions of the treating neurologist, Dr. Privitera, which reliance was acknowledged as reasonable by the Petitioners' experts, Dr. Penney and Dr. Krauss;
4. The Respondents had the benefit of the expert opinion of Dr. Ojemann, a nationally and internationally renowned expert in the field of epilepsy surgery who determined that Respondents met the standard of care in proceeding with and performing the surgery on Tracy Ashcraft;
5. Tracy Ashcraft's very own treating neurologist who has been treating him since the time of the surgery testified that Tracy's problems were the result of the natural progression of his disease and not related to the surgery;
6. Dr. Bornstein, a neuropsychologist from the Ohio State University, thoroughly tested and reviewed the available neuropsychological testing data on Tracy before and after his surgery and concluded that no injury had taken place;
7. The Petitioners' expert neurosurgeon, Dr. Penney, had performed only a handful of epilepsy surgeries and was, in fact, a specialist in spine surgery and was not even board certified in neurosurgery. Dr. Penney was the only neurosurgeon called as an expert witness for the Petitioners;

8. The parties proceeded to a Summary Jury Trial in December, 1995 at which time both parties presented their evidence to an impartial jury and that jury found in favor of the Respondents on the issue of liability. Judge Spiegel told the Respondents at the time and subsequently testified in a Hearing in this matter that the Summary Jury Trial is a prediction of the outcome of Trial;
9. The Petitioners' first and only demand in the case was for Two Million Dollars ($2,000,000) and did not take place until January, 1996, five years after the case was originally filed;
10. The Petitioners, even though they made a Two Million Dollar ($2,000,000) demand in January, 1996, did not provide Dr. Krauss and Dr. Penney up for deposition until one month before Trial and, in fact, Dr. Penney's deposition did not take place until less than two weeks before Trial;
11. The Respondents consulted numerous expert witnesses *all* of whom provided favorable opinions once they had all of the records in the case. There was a delay in getting all of the records in the case as the Respondents were unable to obtain them in a timely matter through the Petitioners;
12. Respondents made no effort to delay the Trial in this matter. The continuances that took place were either by joint motion or were the result of the Petitioners seeking a continuance since the Petitioners had refused to offer their expert witnesses up for deposition; and
13. Judge Spiegel expressed some concern that the Respondents might have liability on the issues of informed consent, but the actual jury verdict in this case was rendered in favor of the Respondents on the informed consent issue.

Ohio law is clear that a party acts in good faith when he refuses to make an offer of settlement when he relies upon expert opinion. *Gallimore v. Children's Hospital Medical Center* (Case No. C-890808, First District Court of Appeals, February 6, 1992); *Holman v. Grandview Hospital Medical Center*, 37 Ohio App. 3d 151 (1987).

The Respondents refer this Court to the unreported opinion in *Gallimore v. Children's Hospital Med. Ctr.*, *supra* for the reason that it is one of the few cases considering prejudgment interest where the court has actually looked at the issue of the Respondents reliance on expert opinion in determining that the Respondents had a reasonable belief in no liability. In that case, the Respondent refused to make an offer of settlement and the jury returned a verdict in excess of One Million Dollars ($1,000,000). Therein, the Court of Appeals stated:

> We believe that the hospitals reliance upon the opinions of Joshua Best's treating physician and other experts that the overdose of gentamicin was not the cause of Joshua's deafness represented a rational evaluation of it's potential liability. The fact that the jury did not credit that expert evidence and returned a verdict for *Gallimore* does not lead to the conclusion that the hospital acted without good faith.

Gallimore v. Children's Hospital Med. Ctr., *supra* at 11.

In *Holman v. Grandview Hospital Med. Ctr.*, *supra*, the Defendant hospital refused the Plaintiff's demand settlement demand of Sixty Thousand Dollars ($60,000) and the jury returned a verdict of One Hundred Eight Thousand Dollars ($108,000). Two experts were retained by the hospital, one of whom was inconsistent on the issue of liability. The Court of Appeals, however, upheld the decision that there should be no prejudgment interest due to the hospital's reliance on it's expert witness. In doing so, the court stated:

> While the jury chose not to accept Dr. Brandabur's opinion as to what caused the injury, we cannot say that the Defendant was not being "objectively

> reasonable" when it took the position that there was no liability in reliance upon Brandabur's opinion. Under *Kalain*, Grandview was under no obligation to make a settlement offer.

Holman v. Grandview Hospital Med. Ctr., 37 Ohio App. 3d at 159.

Further, in *Black v. Bell*, 20 Ohio App. 3d 84, 88 (1984), the court aptly stated:

> Fortuitous foresight does not demonstrate good faith settlement efforts. Nor does poor predictive ability necessarily establish a failure to make such efforts.

In the Petition, Petitioners incorrectly cite a number of court opinions that are not applicable to the issues in this case. In *Brown v. Consolidated Rail Corp.*, 614 F. Supp. 289 (N.D. Ohio ed. 1985), the District Court was considering prejudgment interest based on Federal Statues which required the imposition of such interest. Ohio Revised Code § 1343.03(C) does not require imposition of prejudgment interest without application of the test as outlined in the Ohio Supreme Court's decision in *Kalain v. Smith, supra.*

The Petitioners also cite an Ohio Supreme Court decision in *Royal Elec. Constr. v. OSU*, 73 O.S.3d 111 (1995), but that case deals with application of Ohio Revised Code § 1343.03(C) which deals with claims based on contract where prejudgment interest is required and no test is applied. Ohio Revised Code § 1343.03(C) deals with prejudgment interest in tort cases. Interestingly, the Petition recites Ohio Revised Code § 1343.03(C) and then immediately cites a case interpreting a different statute for the proposition that prejudgment interest should have been awarded in this case.

Petitioners disingenuously claim that Respondents had difficulty obtaining experts. A party is always entitled to choose any expert they desire. Petitioners' delay in responding to discovery requests for nearly two years after the case was filed interfered with Respondents' efforts to obtain experts

[Tr. 1/10/97, pp. 171-172, JA 000310-000311]. Respondents ultimately chose Dr. Ojemann for the reason that Dr. Ojemann was the most credible witness and would make the best impression upon the jury [Tr. 1/10/97, pp. 182, JA 000321].

Perhaps the most compelling evidence that Respondents had a good faith, objectively reasonable belief that they had no liability comes from the defense verdict in the Summary Jury Trial held in December, 1995 [Tr. 1/10/97, pp. 85, JA 000228]. After hearing all the evidence, the Summary Jury found that Respondents were not liable to Petitioners [Tr. 1/10/97, pp. 85, JA 000228]. The Summary Jury Trial was clearly a presentation of the case to an impartial and objective third party: the jury. That jury determined the issue of liability in favor of the Respondents. As Judge Spiegel testified in the January 10, 1997 Prejudgment Interest Hearing, the purpose of the Summary Jury Trial was to predict the verdict of the Trial [Tr. 1/10/97, pp. 70, JA 000213]. The Summary Jury Trial's defense verdict substantiated Respondents good faith objectively reasonable belief that they had no liability.

III. THE STATE OF OHIO HAS NOT RECOGNIZED A PARENTAL CLAIM FOR LOSS OF CONSORTIUM WITH AN ADULT CHILD WHERE THE CHILD HAS BEEN NON-FATALLY INJURED AND THE "DUE PROCESS" CLAUSE OF THE UNITED STATES CONSTITUTION IS NOT VIOLATED WHERE NO PROPERTY RIGHT EXISTED.

The District Court properly dismissed the Petitioner Carolyn Ashcraft's claim for loss of consortium for the harm done to her adult son. Jurisdiction, vary as to whether they recognize a parental cause of action for harm done to their children. *See generally, Extending the Motion of Consortium to the Filial Relationship*, 1989 U.Il.L. Rev. 761 (1991). Historically, courts have denied the parents' claim for recovery of the loss of their child's consortium where a child was non-fatally injured. *See Id.* at 761. Ohio permits the parents' claim

for recovery of the loss of their child's consortium where a child has been non-fatally injured. *Gallimore v. Children's Hospital Medical Center*, 67 Ohio St. 3d 244, 617 N.E.2d 1052, at syllabus par. 1 (1993). However, Ohio has explicitly limited a parents' right of recovery where the injured child is a *minor*. *Id.* at 252.

In *Gallimore*, the Supreme Court of Ohio recognized that a number of jurisdictions have *refused* to recognize the existence of a parental cause of action for the loss of consortium of their children. 67 Ohio St. 3d 254, n.8[1]. In limiting the parents' cause of action to the injuries to a minor child, the Supreme Court of Ohio stated:

> As to the "need" to limit liability, appellant suggests that recognizing the right of parents to maintain a claim for loss of filial consortium (in a derivative action already recognized by law) could eventually lead to the recognition of the right of step parents, brothers, sisters, aunts, uncles, and grandparents, etc., to maintain separate actions for the loss of consortium of the injured child. Appellant essentially urges that a line must be drawn, and that it be drawn here. *We agree with appellant that a line should be drawn somewhere, and today we hold only that the parents of a minor child* may maintain a claim for loss of filial consortium.

Id. (emphasis added).

Petitioners propose that this Court ignore the substantive law of Ohio as defined by Ohio's Supreme Court and adopt the minority rule which recognizes a parental cause of action for loss of consortium of their adult children. Of particular relevance, Petitioners cite *Howard Frank, M.D., P.C. v. Superior*

1. Indeed, the following states do not recognize a common law parental cause of action for the loss of consortium of their children: Alabama, California, Illinois, Massachusetts (superseded by statute), Michigan, Mississippi, Missouri, New Hampshire, Utah, Nevada, Wyoming, New Mexico and New York.

Court, 150 Ariz. 228, 722 P.2d 955 (1986) in which the Arizona Supreme Court recognized a parental cause of action for the loss of consortium of their adult children. In *Gallimore*, *supra*, the Supreme Court of Ohio specifically considered the Arizona rule as set forth in *Howard Frank, M.D., P.C., supra*. *See Gallimore*, 67 Ohio St. 3d 250. However, the Supreme Court of Ohio declined to adopt the rule as adopted by Arizona and instead specifically chose to draw the line of parental loss of consortium claims for injuries to their *minor* children. *Id.* at 252.

Petitioners simply argue that the Arizona view is better. However, Ohio has chosen not to adopt the Arizona view. Since the Supreme Court of Ohio has drawn this line, the District Court properly dismissed Petitioner Carolyn Ashcraft's claim as her son was an adult at the time he was allegedly injured.

Petitioners go on to claim that Tracy Ashcraft had been reduced to the existence of a minor without any citation to the record or evidence thereof. Ohio does not recognize such a distinction. The Supreme Court of Ohio clearly drew the line for only *minor* children. In *Cole & Broomsticks, Inc.*, Case Nos. C-950058 and C-950086, First District Court of Appeals of Ohio (Nov. 15, 1995), the court stated:

> This cause has not been extended by Ohio Courts to the parents of adult children. The rationale given by other Ohio Courts is that parents bear a *natural and legal* burden of care for minor children, but not for adult children.

(Emphasis added) (citations omitted). *Cole & Broomsticks, Inc.* at 3.

The same rationale precludes Petitioners from extending Ohio law to provide a cause of action where the parent's adult child is allegedly reduced to the mental status of a minor. One of the goals of parenthood is to raise children whom will be independent in adulthood. The natural parental burden of care certainly is different when a child is two and when the child is

twenty-two. More importantly, however, a parent in Ohio is *legally* required under the laws of Ohio to care for their minor child. When the child reaches the age of majority, the parent no longer has a legal obligation to bear this burden of care. Since the legal burden of care terminates upon the child's reaching majority, Ohio courts have found that the parents' right to loss of the child's consortium similarly terminates upon the child reaching majority, *See Gallimore*, *supra*; *Broomstick*, *supra*.

Again, where to draw the line is properly a matter of State law. In *Baker v. Superior Court*, 19 Cal. 3d 461, 464, 563 P.2d 871, 873, 138 Cal. Rptr. 315, 317 (1977), California refused to recognize the parents' cause of action against a doctor and hospital for loss of filial consortium where their son was given an incorrect dosage of general anesthesia and reduced to a mental age of three. Ohio has clearly adopted a rule of law that limits the parents' recovery for loss of filial consortium for injuries to their *minor* children.

The Ohio Supreme Court has never held that an injury to an adult child, under circumstances where the adult child is under some mental disability, creates a cause of action for loss of consortium for the parents. The line has to be drawn somewhere and the Supreme Court of Ohio has drawn it to limit such claims only when injuries are to minor children.

Moreover, Petitioners failed to make a statement in their opening statement that Tracy Ashcraft had been reduced to the mental capacity of a child. Thus, the District Court properly directed a verdict in favor of the Respondents on Petitioner Carolyn Ashcraft's claim for loss of consortium of her adult child.

Petitioners fail to properly raise the constitutionality of Ohio's Rule limiting parental consortium claims for *minor* children as an issue for appeal. Thus, Ashcraft is precluded from asserting this argument.

Without waiving Ashcraft's failure to specifically raise the constitutionality of the Ohio Rule, Respondents note the following:

1. Ohio's Rule meets constitutional muster; and,
2. The fact that the Rule varies jurisdictionally demonstrates that Ohio is permitted to define this cause of action as it sees fit.

In passing, Petitioners argue that the Ohio Rule limiting parental consortium claims to harm done to their *minor* children violates the Federal Constitutional provisions for due process.[2] Due process is violated when there is an improper taking of a property right. A right of action in tort is a property right protected by the U.S. and Ohio Constitutions. *See Pickering v. Peskin*, 43 Ohio App. 401, 407 (1930). However, a right of action in tort is only constitutionally protected if it is vested. *See Id.* A cause of action in tort vests when the Petitioner sustains an injury *which the General Assembly has determined is "legally recognizable." Vrable v. Vrable*, 9 Ohio App. 3d 263, 271 (1983).

As demonstrated by *Gallimore*, *supra*, Ohio does not recognize a common law (or legislative) cause of action for parental loss of consortium of their adult children. Therefore, Mrs. Ashcraft's right of action in tort never vested and is not protected by the Due Process Clause of the United States or Ohio Constitutions.

IV. THE DISTRICT COURT PROPERLY ORDERED A SATISFACTION OF JUDGMENT WHERE RESPONDENT HAD PAID THE AMOUNT OF THE JUDGMENT INTO THE COURT.

Respondents offered to pay the Petitioners the full amount of the judgment with postjudgment interest as of the date the offer was made. In order to protect themselves, Respondents required Petitioners to sign and file a Satisfaction of Judgment. Petitioners refused to sign the satisfaction of judgment, but rather insisted upon holding Respondents hostage to ever escalating postjudgment interest.

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2. The Due Process clause of the U.S. Constitution is found at Amendment V and is made applicable to the states, including Ohio, by U.S. Const. Amendment XIV.

It is well settled that postjudgment interest ceases to accrue once the Judgment is paid into the Clerk of courts. *See* Fed. R. Civ. P. 67; *Condero v. DeJesus-Mendez*, 922 F.2d 11, 18 (1st Cir. 1990). The Satisfaction of Judgment represented only the verdict and the postjudgment interest and specifically did not relate to and did not prejudice Petitioners' pending appeals. The Judgment which was satisfied was only that for the verdict and all postjudgment interest: it did not include a Judgment for Carolyn Ashcraft's alleged loss of consortium or Tracy Ashcraft's claim for prejudgment interest which were pending on appeal. Those Judgments would be separate from the Judgment that was satisfied.

Petitioners' reliance on *Seifert v. Burroughs*, 526 N.E.2d 813 (1988) is misplaced. In *Seifert*, *supra*, the court held that where a judgment is rendered against joint tortfeasors, and one of them satisfies the judgment, any appeal the Petitioners may have had against the other was rendered moot because there can only be one satisfaction of judgment. While it is true that a judgment can only be satisfied once, Petitioners' claims for prejudgment interest and loss of consortium were *not* included in the Judgment satisfied by Respondents. Therefore, the Trial Court properly held that Respondents had satisfied the Judgment and the Order of Satisfaction of Judgment should be AFFIRMED.

V. PETITIONERS' PAYMENT OF A REGISTRY FEE DID NOT VIOLATE THE FEDERAL CONSTITUTION.

Petitioners complain that the Clerk of courts charged them One Thousand Eight-Six Dollars and Sixty Cents ($1,086.60) for a "registry fee" and again argues that the Respondents wrongfully paid the judgment into the Clerk of courts even though the Petitioners had refused to accept direct payment of the judgment when repeatedly offered by Respondents in return for a Satisfaction of Judgment. Again, Petitioner's desire to hold Respondents hostage to postjudgment interest by failing to accept the payment of the judgment forced Respondents to pay

the money into the court. Certainly, Respondents were permitted to pay the judgment into the court. *See* Fed. R. Civ. P. 67; *Condero, supra* at 18, *Devex Co. v. General Motors Corp.*, 638 Fed. Supp. 940 (D. Del. 1986).

The "registry fee" was required solely due to the Petitioners' intransigence in failing to accept payment and it would be unfair to require Respondents to now pay it. *See Overbek v. Heimbek*, 101 F.3d (1996). Further, it is important to note that the Clerk of courts charged Petitioners the registry fee so that it could place the judgment into an interest bearing account. Even with the registry fee, Petitioners retained the benefit of nearly Eleven Thousand Dollars ($11,000) in interest for the reason that the Clerk placed the Judgment in an interest bearing account. Petitioner should not be permitted to now complain of the cost of placing the Judgment in an interest bearing account from which Petitioners earned approximately Eleven Thousand Dollars ($11,000).

VI. IN A TORT ACTION BROUGHT IN FEDERAL COURT BASED ON DIVERSITY OF JURISDICTION, POSTJUDGMENT INTEREST SHOULD BE CALCULATED ACCORDING TO FEDERAL LAW.

Petitioners incorrectly urge that postjudgment interest in the instant action should have been determined by Ohio's postjudgment interest statute (O.R.C. § 1343.03(C)). However, this case was heard in U.S. District Court pursuant to diversity jurisdiction under 28 U.S.C. § 1332. Postjudgment interest on *any* judgment in a civil case heard in a U.S. District Court is governed by 28 U.S.C. § 1961, which provides the rate of interest and states in pertinent part:

> **§ 1961. Interest.**
>
> Interest shall be allowed on *any monetary judgment in a civil case recovered in a district court* . . . Such interest shall be calculated from the date of the entry of judgment, at a rate equal to the coupon issue yield

> equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction price for the last auction of fifty-two week United States Treasure bills settled immediately prior to the date of the judgment . . .

(Emphasis added). Clearly, Petitioners' Judgment in the District Court in this diversity non-contractual case falls within the broad definition of "any monetary judgment in a civil case rendered in a District Court" for which 28 U.S.C. § 1961 applies. Numerous decisions rendered in other circuits affirm that the postjudgment interest rate provided in 28 U.S.C. § 1961 applies to diversity judgments rendered in a civil case recovered in a District Court.[3]

The Supreme Court of the United States has refused to grant certiorari to Circuit Court decisions that held the postjudgment interest rate provided in 28 U.S.C. § 1961 is properly applied to judgments in diversity cases rendered in District Courts.[4]

Petitioner relies on *Andoco, Inc. v. Reynolds Metals Co.*, 572 F. Supp. 895, 896 (W.D. Mich. 1983), *aff'd*, 743 F.2d 417 (6th Cir. 1984) for the proposition that the Sixth Circuit has held

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3. *Adams-Arapahoe Joint School Dist. No. 28-J v. Continental Ins. Co.*, 891 F.2d 772 (10th Cir. 1989); *Plant v. Estate of Rogers*, 959 F. Supp. 1302 (D. Colo. 1997); *Everaard v. Hartford Acc. And Indem. Co.*, 842 F.2d 1186 (10th Cir. 1988); *Forest Sales Corp. v. Bedingfield*, 881 F.2d 111 (4th Cir. 1989); *Inssho-Iwai Co., Ltd. v. Occidental Crude Sales, Inc.*, 848 F.2d 613 (5th Cir. 1988); *Happy Chef Systems, Inc. v. John Hancock Mut. Life Ins. Co.*, 933 F.2d 1433 (8th Cir. 1991); *Mobile Exploration & Producing North American, Inc. v. Graham Royalty, Ltd.*, 910 F.2d 504 (8th Cir. 1990); *American Tel. & Tel. Co. v. United Computer Systems, Inc.*, 98 F.3d 1206 (9th Cir. 1996); *G.N. Broad. & Co., Inc. v. U.S. Home Corp.*, 759 F.2d 1526 (11th Cir. 1985); *Harmon v. Clark Equipment Co.*, 657 F. Supp. 873 (D. Me. 1987).

4. *See Chapman v. Cole & Intel Container Intern. B.V.*, 865 F.2d 676 (10th Cir. 1989), *cert. den., Urquhart & Hassel v. Chapman & Cole*, 493 U.S. 872 (1989); *Wilson v. Burlington Northern R. Co.*, 803 F.2d 563 (10th Cir. 1986), *cert. den.*, 480 U.S. 946 (1987); *Evans v. City of Chicago*, 873 F.2d 1007 (7th Cir. 1989), *reh'g den., cert. den.*, 495 U.S. 956 (1990).

that state law applies to postjudgment interest in diversity cases. A careful reading of *Andoco*, *supra* reveals that the court relied upon 28 U.S.C. § 1961 in deciding that state law applied to postjudgment interest in diversity cases. 743 F.2d at 419-420. Clearly, in *Andoco*, *supra*, the court erroneously relied upon 28 U.S.C. § 1961 as it was written prior to its Amendment on October 1, 1982 which provided that postjudgment would be provided "at the rate allowed by State law". *See* 28 U.S.C. § 1961 (1976); 1982 – Subsec. (a). Pub. L. 97-164; § 302(a)(1),(2). The Respondent in *Andoco*, *supra* did not raise the court's failure to recognize the October 1, 1982 Amendment of 28 U.S.C. § 1961 and, so, Petitioners' reliance thereon is misplaced.[5]

Clearly, 28 U.S.C. § 1961, as it has existed since October 1, 1982 provides the rate for postjudgment interest in diversity cases. State law does not. Since the Trial Court applied the rate for postjudgment interest found in 28 U.S.C. § 1961, the proper rate for any judgment in District Court, the Trial Court should be AFFIRMED.

Petitioners further argue that 28 U.S.C. § 1961 is unconstitutional, as applied to this case, for the reason that it violates the Fifth Amendment of the United States Constitution by denying Petitioners due Process of Law. As demonstrated herein, 28 U.S.C. § 1961 was amended on October 1, 1982 to provide a federal interest rate to all civil judgments taken District Court. *See* 28 U.S.C. § 1961, 1982 Subsec. (a) Pub. L. 97-164, § 302(a)(1), (2). The federal statutory right (including the rate) was established long before Petitioners filed their Complaint. Petitioners did not have property interest in a higher rate of prejudgment interest than that provided by 28 U.S.C. § 1961.

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5. Petitioner also cites *Yasuko N. Sakamoto v. John A. Walkup*, 762 F.2d 1011 (6th Cir. 1985) for the erroneous proposition that state law applies to postjudgment interest in diversity cases. However, *Sakamoto*, *supra* is merely Sixth Circuit's affirmance of an unpublished opinion by the lower court. There is no discussion whatsoever of the merits of the case and, thus, provides this Court no guidance.

By subjecting themselves to Federal jurisdiction, Petitioners were bound by the Federal rate of postjudgment interest found in 28 U.S.C. § 1961.

- Further, in *Weitz Co. v. M-Kan Carpet, Inc.*, 723 F.2d 1382 (8th Cir. 1983), a case cited by Petitioners, the court found that 28 U.S.C. § 1961 was constitutional (although the challenge there was based on the Sixth Amendment).

Petitioners' first objection to the rate of postjudgment interest came on Appeal. Although Petitioners objected to the Trial Court's granting Respondents Motion for Satisfaction of Judgment, Petitioners' objection was solely based on the erroneous proposition that entering a Satisfaction of Judgment would render Petitioners' pending appeal moot. Petitioners failed to object to the calculation of interest and, therefore, waived their right to do so now.

VII. PETITIONERS' FAILURE TO MAKE ANY TIMELY EFFORT TO PRESERVE THE RECORD OF PRIVILEGED PORTIONS OF RESPONDENTS' "CLAIM FILE".

As set forth in the Statement of the Case, Petitioners did nothing to preserve the record of the documents from the insurance company claims file which were withheld on grounds of privilege. Petitioners' first effort in this regard was not until January 23, 1998 when the Petitioners moved the court to complete the record by including the documents from the *in camera* inspection that occurred on October 11, 1996. The court denied the Motion since the documents were no longer in the possession of the court or the Clerk and Petitioners had made no effort to have the *in camera* documents marked or otherwise sealed and made part of the record.

Petitioners were well aware that the District Court agreed to make an *in camera* inspection of the documents from the Respondents' insurance company's claim file. Respondents' insurer claimed that some of these documents were subjected to privilege. Nonetheless, Petitioners failed to request that the documents be marked as an exhibit and otherwise failed to make any efforts to preserve the documents for appellate review. Only after the

Petitioners began the pursuit of an appeal of the denial of the Motion for Prejudgment Interest did they request the documents be designated as an exhibit for appellate review.

Petitioners' reliance on *In United States of American, ex rel. Taxpayers Against Fraud v. General Electric*, 41 F.3d 1032 (6th Cir. 1994) and *Ingle v. Dept. Justice*, 698 F.2d 259, 263 (6th Cir. 1983) is misplaced. Those cases dealt with judicial review of an administrative agency's denial of a plaintiff's Freedom of Information Act request. Thus, the subject matter of the entire action was the discoverability of the documents. Herein, the in camera review of the documents Respondents claimed were privileged was within the context of Petitioners' Motion for Prejudgment Interest. While Petitioners may discover the insurer's claims file in a prejudgment interest hearing, that "right" is not absolute. *See Peyko v. Frederick*, 25 Ohio St. 3d 164, 495 N.E.2d 918 (1986). Indeed, documents within the claims file which go to the theory of defense in the case are privileged and are not discoverable. *Id.* The proper procedure was to conduct an in camera inspection of the privileged documents so that the court could decide whether the claims of privilege had merit. The Trial Court followed proper procedure and found that the documents were privileged. Petitioners' failed to request that the documents be marked as an exhibit and made no effort to include them as part of the record. Therefore, Petitioners waived any alleged error.

CONCLUSION

For the reasons given above, the Petition should be denied.

Respectfully submitted,

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